



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes:** FFL MNRL

### **Introduction**

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("the *Act*") for:

- a monetary order for money owed or compensation for monetary loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The tenants confirmed receipt of the landlord's application for dispute resolution hearing. In accordance with section 89 of the *Act*, I find that the tenants duly served with the landlord's application. All parties confirmed receipt of each other's evidentiary materials, and that they were ready to proceed

At the beginning of the hearing, the tenants testified that the rental address noted on the application was incorrect. As neither party was opposed, the rental address was amended to reflect the correct rental address.

### **Issue(s) to be Decided**

Is the landlord entitled to monetary compensation for monetary and losses?

Is the landlord entitled to recover the filing fee for this application from the tenants?

**Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy began on February 1, 2019, and was to end on June 1, 2021. Monthly rent was set at \$3,000.00, payable on the first of the month. The landlord had collected a security deposit in the amount of \$1,645.00, which the landlord still holds. It is undisputed by both parties that this tenancy had ended on January 9, 2021 as the tenants had obtained employment in the United States, and had no choice but to end the tenancy and relocate.

The landlord is seeking a monetary order for lost rental income for the months of February 2021 through to May 2021 in the amount \$12,000.00, plus recovery of the filing fee. The landlord testified that they had advertised the rental unit immediately by posting advertisement online and in the building, but due to the high vacancy rates in the area, the landlord has not been successful in finding a new tenant. In addition to these reasons, the landlord testified that there was a restriction on short term rentals in the building.

The landlord testified that they made genuine efforts to find new tenants, but due to the pandemic related issues such as travel restrictions, and reduced interest in renting downtown, they have been unable to find new tenants as of the hearing date, even though the landlord was willing to accept reduced rent of \$2,500.00. The landlord testified that they did initially post the rental unit for \$3,000.00 as they believed this to be market value, and the landlord relied on the monthly rent as their sole source of income. The landlord testified that a significant reduction in monthly rent would not allow the landlord to cover their mortgage payments and expenses. The landlord testified that they had re-posted the ad every couple weeks, without any success. The landlord submitted copies of the advertisements that were posted, dating back to December 2020.

The tenants testified that the landlord had never provided a mailing address to them, and that they had to locate the landlord themselves. The tenants submitted that after they located the landlord's address, they sent their forwarding address and gave written notice by way of registered mail on December 22, 2020. The tenants provided a copy of the tracking information and receipt for this package. The tenants do not dispute that they had moved out early, but testified that they had no choice in order to secure their

new employment. The tenants testified that the landlord failed to mitigate their losses, and was only interested in tenants of a specific nationality, as evidenced by the postings in Chinese. The tenants testified that the landlord also failed to mitigate their losses by refusing to rent for less than \$3,000.00, or allow the tenants to sublet the rental unit for less, and subsidize the difference. The tenants testified that they believed that the landlord actually owned multiple rental units, as communicated to them by the landlord herself. The tenants testified that the landlord was difficult and kept the tenants' legal documents. The tenants testified that they had given ample notice to the landlord, and had made attempts to assist the landlord with filling the vacancy.

The landlord responded that the statements made by the tenants were untrue, and that there were postings within the building, with no mention of specific nationalities or race. The landlord testified that they only owned this one rental unit in addition to their primary residence, and deny that they owned multiple rental units. The landlord testified that the tenants' claims were false and unsupported in evidence.

### **Analysis**

Section 44 of the *Residential Tenancy Act* reads in part as follows:

**44** (1) A tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:...
- (b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
- (c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

**45** (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

While the tenants did give ample notice and notified the landlord of the early termination of this fixed-term tenancy, they did not end it in a manner that complies with the *Act*, as stated above. The landlord did not mutually agree to end this tenancy in writing, nor did the tenants obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy. No applications for dispute resolution have been filed by the tenants in regards to this tenancy. The tenants moved out earlier than the date specified in the tenancy agreement.

The evidence is clear that the tenants did not comply with the *Act* in ending this fixed term tenancy, and I therefore, find that the tenants vacated the rental unit contrary to Section 45 of the *Act*. I must now consider whether the landlord is entitled to the loss of rental income for February 2021 to May 2021.

Although the tenants do not dispute that they had ended this fixed-term tenancy prior to the end of the term, the tenants dispute the landlord's monetary claim, stating that the landlord failed to mitigate their losses. The tenants feel that the landlord had refused to consider other options such as lowering the rent and allowing the tenants to subsidize the difference, limited the landlord's ability to find new tenants. The tenants also feel that the landlord had certain criteria such as nationality, as evidenced by the Chinese language advertisements, which also limited the landlords' ability to re-rent the rental unit. The tenants questioned the landlord's efforts in trying to re-fill this vacancy.

The landlord testified that they did mitigate their losses by advertising and attempting to fill the vacancy with a suitable tenant as soon as possible, but due to circumstances beyond their control, they have been unable to fill the vacancy, even after the end of the fixed-term. The landlord testified that as of the hearing date, the unit remains vacant. The landlord provided various reasons for why the rental unit remains vacant, such as high vacancy rates due to the lower demand to live downtown. The landlord also referenced restrictions on short-term rentals. The landlord supported their efforts by submitting copies of advertisements and postings that were posted as early as December 2020. The landlord testified that they posted within the building as well, and deny any preference for a certain nationality or race. The landlord testified that they relied on the rental income as their source of income, and deny owning multiple rental units. The landlord testified that they felt \$3,000.00 was fair market rent for the rental unit, and therefore did not want to lower the requested amount until later.

Residential Tenancy Policy Guideline #5 addresses a landlord's duty to minimize loss and states the following:

*"Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss<sup>1</sup>. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.*

*The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation<sup>2</sup>. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.*

*Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.*

*The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."*

I have considered the tenants' concerns that the landlord did not make reasonable efforts to fill the vacancy. In consideration of whether the landlord fulfilled their obligations to make reasonable attempts to minimize the loss claimed, I find that the landlord did provide supporting documentation to show that they did make an effort to fill the vacancy. I find that several of the points raised by the tenants were not supported in evidence, such as the belief that the landlord actually owns several rental units, and that the landlord had limited the prospective tenants to only certain nationalities. The landlord denied these points, and I do not find these statements to be sufficiently supported. I note that the landlord did provide copies of postings in Chinese, but I do not find this to be unreasonable considering the fact that Chinese appears to be the landlord's primary language, as evidenced by the need for an interpreter at the hearing. I am also not convinced that this is the reason for why the landlord has been unable to

fill the vacancy. Furthermore, I find that the landlord provided a reasonable explanation for why they had decided to post the unit for \$3,000.00 per month. The tenants had resided in the rental unit since February 1, 2019, and monthly rent was \$2,890.00 as indicated by the first fixed-term agreement. I find it reasonable for the landlord to expect \$3,000.00 for monthly rent, and that any significant reduction in rent could possibly put the landlord in a difficult financial situation as the landlord had budgeted that amount to cover their expenses. Although the tenants may have proposed a sublet for less monthly rent, with the subsidization of the remaining rent, I find that the landlord had genuine concerns about the loss of guaranteed rental income for the remaining period of the fixed-term, and I find this explanation to be credible and reasonable.

In light of the evidence and testimony before me, I find that the landlord had made an effort to mitigate the tenants' exposure to the landlord's monetary losses as is required by section 7(2) of the *Act*. I find that the landlord provided credible and reasonable testimony for why they have been unable to fill the vacancy as of the hearing date. I, therefore, allow the landlord's entire monetary claim for loss of rental income for February 2021 through to May 2021.

As the landlords was successful in their claim, I allow the landlord to recover the filing fee for this application.

The landlord continues to hold the tenants' security deposit of \$1,645.00. Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant."

I find that it was undisputed that the tenants provided their forwarding address to the landlord by way of registered mail on December 22, 2020 I find that the landlord is still in possession of the entire deposit, and did not file their application for dispute

resolution until March 7, 2021, well past the required time period. I am not satisfied that the tenants had given permission for the landlord to retain any portion of their deposit.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch's Policy Guidelines would seem to be of relevance to the consideration of the return of the tenants' security deposit, and the offsetting provisions of the Act.

*Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:*

- *if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;*
- *if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *if the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the dispute resolution process;*
- *if the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

*In determining the amount of the deposit that will be doubled, the following are excluded from the calculation:*

- *any arbitrator's monetary order outstanding at the end of the tenancy;*
- *any amount the tenant has agreed, in writing, the landlord may retain from the deposit for monies owing for other than damage to the rental unit(see example B below);*
- *if the landlord's right to deduct from the security deposit for damage to the rental unit has not been extinguished, any amount the tenant has agreed in writing the landlord may retain for such damage.*

As stated in Section D, #3 of Policy Guideline #17: *"If a landlord does not return the security deposit or apply for dispute resolution to retain the security deposit within the time required, and subsequently applies for dispute resolution in respect of monetary claims arising out of the tenancy, any monetary amount awarded will be set off against double the amount of the deposit plus interest."*

In accordance with sections 38 and 72 of the Act, and policy guideline #17, I order that the landlord's monetary award be offset against double the amount of the security deposit.

Although both parties referenced a dispute over the return of keys and fobs for this tenancy, I find that this issue is not before me as part of the current application.

Accordingly, I decline to make any findings or orders in relation to this the return of the keys or fobs, or any associated losses or compensation.

### **Conclusion**

I issue a Monetary Order in the amount of \$8,810.00 in the landlord's favour as set out in the table below.

Loss of Rent for February 2021 to May 2021	\$12,000.00
Filing Fee	100.00
Less Double the Security Deposit	-3,290.00
<b>Total Monetary Award</b>	<b>\$8,810.00</b>

The landlord is provided with this Order in the above terms and the tenant(s) must be served with a copy of this Order as soon as possible. Should the tenant(s) fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: July 26, 2021

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Residential Tenancy Branch